

SERVICE DATE - MAY 12, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-596

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION — ADVERSE
ABANDONMENT — NEW YORK CROSS HARBOR RAILROAD
IN BROOKLYN, NY

Decided: May 9, 2003

On December 4, 2001, New York City Economic Development Corporation (NYCEDC), on behalf of the City of New York (City), filed an application under 49 U.S.C. 10903, requesting that we find that the public convenience and necessity (PC&N) require or permit the abandonment of the tracks and facilities at the Bush Terminal Yards (a/k/a “First Avenue Yards”) and the 51st Street floatbridge and related tracks at the Harborside Industrial Center (a/k/a “Brooklyn Army Terminal”) (jointly the tracks and facilities), in Brooklyn, Kings County, NY.¹ The New York Cross Harbor Railroad (NYCH) presently operates over the tracks and facilities under a lease with the City, which owns the property. NYCH filed a protest to the application on January 18, 2002. In addition, a joint protest was filed by seven local shippers who use the services of NYCH.² NYCEDC replied to NYCH’s protest and the joint protest on February 4, 2002.

¹ NYCEDC’s request for waiver of certain regulations relating to notice and filing requirements for abandonment applications was granted in part by a decision served on December 3, 2001 (December 2001 decision). Notice of the filing of the application was served and published in the Federal Register (66 FR 66014) on December 21, 2001. In that notice, the Board also granted NYCEDC’s petition for a 1-day extension of time to file its application in this case, and accepted NYCEDC’s supplement filed on December 10, 2001, that addressed requirements not waived by the December 2001 decision.

² The shippers are: American Warehouse, Inc. (Warehouse), a shipper and receiver of cocoa beans and lumber, respectively; Cropsey Scrap Iron and Metal Corp. (Cropsey), a shipper of scrap metal; Davidson Pipe Supply Co. (Davidson), a receiver of steel pipe; Dorann Resources Ltd. (Dorann), a shipper of scrap metal; Franklin Poly Corp. (Franklin), a receiver of plastic pellets; Interdynamics, Inc., a receiver of refrigerant; and Midwood Lumber and Millwork, Inc. (Midwood), a receiver of lumber and plywood.

BACKGROUND

The tracks and facilities have been owned by the City since 1965.³ New York Dock Railway (NYDR) had conducted business at the tracks and facilities between August 1973 and August 1984 under a lease issued by New York City's Department of Ports and Terminals (Ports and Terminals). In 1983, NYCH was established, and it acquired the assets and operations of the former Brooklyn Eastern District Terminal Railroad and NYDR pursuant to authority received from our predecessor agency, the Interstate Commerce Commission (ICC), in New York Cross Harbor Terminal Corp.—Exemption for Operation and Issuance of Securities, Finance Docket No. 30183, et al. (ICC served July 15, 1983). In September of 1984, under a Ports and Terminals occupancy permit, NYCH replaced NYDR as the tenant at the tracks and facilities. Among other local operations, NYCH operates a car float service in the New York metropolitan area, in which it transports rail freight cars, on barges pushed by tugboats, from the tracks and facilities at issue here to its Greenville terminal in Jersey City, NJ (Greenville terminal), where the cars are transferred to Norfolk Southern Railway Company (NS).⁴ Beginning in 1992, NYCEDC assumed management of NYCH's occupancy permit on behalf of the City's Department of Business Services, which had assumed management of NYCH's lease from Ports and Terminals.

PRELIMINARY MATTERS

Certain procedural matters were raised by NYCH in its December 17, 2001 motion to reject the notice of intent, adverse abandonment application, and supplement to the application, and reply to the petition for extension (December 2001 motion). NYCH contends that both the application and the supplement to the application should be rejected because all the evidence was not contained in the application as required and because both were improperly served on parties. Inasmuch as the supplement addressed requirements that NYCEDC had unsuccessfully requested be waived, and no party was harmed or prejudiced by the delay in receiving the information contained in the supplement, we will deny NYCH's motion to reject the supplement. In its motion, NYCH also contends that NYCEDC's notice of intent was defective, arguing that NYCEDC did not properly file, publish, and

³ The tracks and facilities were developed in 1895 and privately owned until 1965.

⁴ In 1993, NYCH acquired the Greenville terminal from Consolidated Rail Corporation.

serve the notice of intent.⁵ All of the issues addressing the notice of intent were either fixed by the supplemental filing or no party was harmed or prejudiced by whatever flaw existed.⁶

On February 13, 2002, NYCH filed a motion to strike certain new evidence⁷ raised in NYCEDC's reply to NYCH's protest. On February 25, 2002, NYCEDC filed a reply to NYCH's motion to strike. We will grant the motion to strike the new evidence because it was in NYCEDC's possession before it filed its application and it is not responsive to evidence that was previously presented.

By a decision served on March 25, 2002, a request by the parties to hold the proceeding in abeyance was granted to enable the parties to negotiate a resolution of the issues raised. By letter filed on October 21, 2002, NYCEDC stated that NYCH had made no progress towards reaching an agreement, and thus requested that we move forward with this proceeding. NYCH filed a reply on November 12, 2002, as supplemented on November 13, 2002, opposing NYCEDC's request and characterization of its negotiations. NYCH gives details of its attempts to negotiate a mutually acceptable resolution and maintains that NYCEDC is the party holding up the proceedings. Additionally, NYCH requested that we continue to hold this proceeding in abeyance.

⁵ NYCH raises several points with respect to the notice of intent. First, it argues that the notice of intent was improperly served on the various parties. However, any possible errors in service did not harm or prejudice any party. Second, NYCH states that NYCEDC did not publish the notice of intent as required in 49 CFR 1152.20(b)(4), arguing that the publications were "bunched" in a 10-day period and, accordingly, do not satisfy our regulations. We do not accept this argument. The regulations state that publication must occur over three consecutive weeks, and we consider the first day of a week to be Sunday. Because publication was made during a separate but consecutive 3-week period (on November 23, November 28, and December 2, 2001), the publication requirement was met. Third, NYCH argues that NYCEDC served its outside counsel but did not serve NYCH. Under 49 CFR 1104.12(a), however, when a party is represented by a practitioner, service upon the practitioner is deemed to be service on the party. Finally, NYCH argues that NYCEDC did not include alternate sources of transportation and affidavits of publication as required by 49 CFR 1152.22(e)(3) and 1152.20(a)(4). Because NYCEDC's supplemental filing contains this information, all requirements have been met.

⁶ NYCH also asks that NYCEDC's request for an extension of time to file the adverse abandonment application be denied, but the extension was granted in the notice served and published on December 21, 2001, because NYCEDC had shown good cause and no party was prejudiced.

⁷ The new evidence consists of allegations of an illegal structure on the property and the disrepair of the floatbridge.

In a decision served on December 27, 2002, NYCH's request was granted and the proceeding was held in abeyance until January 31, 2003. By that date the parties were to file a status report. In its report, NYCH requested that we continue to hold the proceeding in abeyance while negotiations continued with Canadian Pacific Railway Company (CP) for use of a nearby rail yard.⁸ NYCEDC in its status report requests that we move forward with this proceeding. In a letter filed May 5, 2003, NYCH indicates that it has negotiated and signed an agreement with CP giving NYCH access to the 65th Street rail yard, but that it still needs to reach an agreement with the City for the use of the floatbridge. NYCH also states that it has negotiated an agreement for interchange of traffic with the New York and Atlantic Railway (NY&A), which would allow NYCH to reach its Brooklyn and Long Island customers.⁹

NYCH requests that we defer a final decision on the adverse abandonment for an additional 60 days so that it can negotiate with the City for use of the floatbridge.¹⁰ NYCEDC replied on May 8, 2003,¹¹ and again urges that the Board issue a decision on its application. We have already held this proceeding in abeyance for a significant period of time. While we view NYCH's representation that it has an agreement with CP as a positive step, and NYCH can continue its efforts to reach a mutually acceptable resolution with the City, we do not believe it is necessary or appropriate to delay our proceeding any further.

POSITIONS OF THE PARTIES

NYCEDC contends that NYCH's use of the tracks and facilities on the City's property is not in the public interest because NYCH has breached its lease by violating local fire codes (specifically, the lack of a sprinkler system in NYCH's headquarters building) and state and Federal environmental laws. NYCEDC maintains that NYCH has caused and will continue to cause significant environmental damage to the tracks and facilities by burying or dumping chemicals and pesticides used in the operation and maintenance of a railroad. Moreover, NYCEDC asserts that NYCH is financially

⁸ The City owns a floatbridge and rail yard at 65th Street in Brooklyn (65th Street facility). The rail yard is leased and operated by CP.

⁹ Before reaching this agreement, NYCH had argued that shippers would experience higher rates and slower transit times if NYCH had to traverse NY&A's connecting track.

¹⁰ NYCH asks us to order the parties to conclude negotiations within that time period, and to set the terms and conditions for the use of the floatbridge if the parties are unable to reach an agreement on their own. But NYCH has not provided a basis for such action.

¹¹ NYCH submitted a response on May 8, 2003.

unstable, as evidenced by the fact that NYCH has lost over \$2 million per year from 1996 to 1999 and has incurred late fees of approximately \$20,000 since July 1995 on its lease payments. NYCEDC also contends that the abandonment would not have an adverse impact on the shipping public or NYCH because NYCH could have an alternate landing site at the City's 65th Street facility that would allow it to connect to its current rail rights-of-way and destination points.

NYCH asserts that the real reason the City is seeking an adverse abandonment is to allow it to redevelop the waterfront area, not because of the alleged environmental, financial, and state code violations cited by NYCEDC in its application. NYCH submits that environmental damage has not been shown. NYCH further submits that it has attempted to correct the sprinkler system problem by hiring a NYCEDC-approved contractor to perform the needed repairs, but that the contractor would not perform the repairs due to a dispute with NYCEDC. NYCH states that it remains committed to resolving the problem nonetheless. NYCH also submits that it is financially stable and points out that NYCEDC's own evidence indicates that NYCH is current in its rental payments. NYCH claims that the \$2 million a year in losses were not from railroad operations, but rather from a series of one time financial write-offs of its parent company. Finally, NYCH disputes NYCEDC's claim that an adverse abandonment would not have an adverse impact on the shipping public in Long Island and Brooklyn.

As previously mentioned, the seven Brooklyn shippers located on the line (collectively the shippers) filed a joint protest.¹² They claim that the availability of the 65th Street facility would not alleviate the adverse impact of an abandonment because they would have the added costs of trucking, and transloading, as well as the cost for extra handling. The shippers argue that these added costs would significantly harm their competitive position in relation to other shippers in the New York City area that would continue to have direct rail service at their places of business. Warehouse, the largest local shipper, claims that it would not be able to continue in business if it lost direct rail service.

In its reply, NYCEDC does not deny that it plans to redevelop and expand marine terminals and reconfigure the subject rail facilities to accommodate those changes.¹³ NYCEDC states, however, that these plans are not the reason for its seeking an adverse abandonment. Rather, NYCEDC asserts that the PC&N is no longer served by NYCH's continued use of the tracks and facilities. Accordingly, NYCEDC has concluded that the time has come, under state law and the rights contained in the lease agreement between the parties, to evict a noncomplying tenant.

¹² According to the joint protest, each of these shippers either originates or terminates shipments by rail on NYCH at or near the Brooklyn waterfront. Collectively, they accounted for over 1,000 carloads of local traffic on NYCH in the year 2000.

¹³ Approximately \$17 million have been made available for this construction.

NYCEDC further asserts that the shippers have overstated the adverse impact an abandonment would have on their businesses. NYCEDC argues that Warehouse would not be put out of business if the tracks and facilities were abandoned because its situation would not change, as it does not have direct rail service now. Moreover, NYCEDC asserts that Cropsey and Dorann already move their outbound loads by truck to the NYCH facility and the difference in distance to move the trucks to the 65th Street facility is minimal. Therefore, the abandonment of the tracks and facilities would not make a difference, because there is another transload yard within roughly equivalent driving distance.

DISCUSSION AND CONCLUSIONS

On occasion, a noncarrier will seek, and a rail carrier will oppose, an abandonment under 49 U.S.C. 10903. See Western Stock Show Assn.–Aban. Exemption–in Denver, CO, 1 S.T.B. 113 (1996); Chelsea Property Owners - Aban. - The Consol. R. Corp., 8 I.C.C.2d 773 (1992), aff'd sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994); Modern Handcraft, Inc.–Abandonment, 363 I.C.C. 969 (1981).

The statutory standard governing any application to abandon a line of railroad, including an adverse abandonment, is whether the present or future PC&N require or permit the proposed abandonment. 49 U.S.C. 10903(d). Congress left it to us, in implementing this standard, to balance the competing benefits and burdens of abandonment on all interested parties, including the railroad, the shippers who have used the line, the community involved, and interstate commerce generally. See City of Cherokee v. ICC, 727 F.2d 748 (8th Cir. 1984) (Cherokee). If we grant an adverse abandonment, our exclusive and plenary jurisdiction is removed, thereby enabling the parties to undertake other legal remedies that are otherwise barred to seek to eject the carrier and allow the property to be used for other purposes. As we have frequently stated, we will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of state law where no overriding Federal interest exists. See CSX Corp. and CSX Transportation Inc.-Adverse Abandonment Application-Canadian National Railway Company and Grand Trunk Western Railroad, Inc., STB Docket No. AB-31 (Sub-No. 38) (STB served Feb. 1, 2002).

In this case, we conclude that the public interest does not require continued rail service by NYCH at the tracks and facilities at issue, and, therefore, we will grant the adverse abandonment application. This property is owned by the City, which as a government entity represents all of its citizens, not just the businesses that use NYCH's services. The City has concluded that this property should be put to other public uses, and we will not block the City from using its property as it wishes absent an overriding need for the rail service. See Norfolk & W. Ry. Co.–Aban. Exem.–Cinn., Hamilton County, OH, 3 S.T.B. 110 (1998).

There is relatively little traffic on this line,¹⁴ and as to that traffic, the record shows that the shippers will continue to have transportation options, as NYCEDC has pointed out. Indeed, we note that alternate routing exists for NYCH traffic moving between New Jersey and Brooklyn. Traffic can be interchanged at Fresh Pond Junction, in Queens County, NY, then moved by CSX Transportation, Inc., via the Hudson Division to or from its Selkirk yard near Albany, NY. Moreover, because NYCH is continuing to pursue use of the 65th Street facility, another floatbridge operation may be available. Under these circumstances, there is no overriding public need for this rail service and our jurisdiction therefore should not be a bar to the City's attempt to evict a tenant that it deems to be troublesome and devote the property to another public use.

LABOR PROTECTION

In approving this application, we must ensure that affected rail employees will be adequately protected. 49 U.S.C. 10903(b)(2). We have found that the conditions imposed in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), satisfy the statutory requirements, and we will impose those conditions.

ENVIRONMENTAL ISSUES

We are also required by the National Environmental Policy Act to consider the environmental impacts of the proposed abandonment. NYCEDC submitted an environmental report with its application and notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 CFR 1105.7. Our Section of Environmental Analysis (SEA) examined the environmental report, verified its data, and analyzed the potential environmental effects of the proposed action. SEA served an Environmental Assessment (EA) on January 4, 2002, and requested comments by February 1, 2002. In its EA, SEA indicates that the New York Department of State, Division of Coastal Resources, has asked to review the proposed abandonment for consistency with the New York State Coastal Management Program. Therefore, SEA has recommended that, prior to any salvage activities, NYCEDC should be required to consult with the New York Department of State, Division of Coastal Resources, to determine if a New York State Coastal Management consistency certification is required and, if certification is

¹⁴ Where warranted, abandonments have been granted where there is some traffic on the line. See Cherokee; Missouri Pacific R. Co. v. ICC, 625 F.2d 178 (8th Cir. 1980); Marshall Durbin Food Corp. v. ICC, 959 F.2d 915 (11th Cir. 1992).

required, prohibit any salvage activity until it is obtained.¹⁵ The EA concludes that, as conditioned, the proposed abandonment would not significantly affect the quality of the human environment.

SEA placed Post Environmental Assessment recommendations addressing the comments filed by the New York State Department of Environmental Conservation (NYSDEC) in the docket on February 6, 2002. Based on that comment, SEA recommended that the abandonment, if approved, should be subject to a condition requiring NYCEDC to consult with NYSDEC to determine whether any hazardous materials investigation or remediation is required in the project area, and that if this is required, NYCEDC should be prohibited from salvage activities until it performs adequate investigation and remediation and notifies the Board with written verification.¹⁶

Except for the change noted in footnote 12, we will adopt SEA's recommendations in the EA, as modified in the Post EA, and will impose the conditions recommended by SEA. Based on SEA's recommendations, we conclude that the proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

We find:

1. The present or future public convenience and necessity permit the abandonment of the tracks and facilities, subject to the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the following conditions: (1) prior to any salvage activities, NYCEDC shall consult with the New York Department of State, Division of Coastal Resources, to determine whether New York State Coastal Management consistency certification is required, and if consistency certification is required, NYCEDC shall be prohibited from performing any salvage activities until it obtains consistency certification and shall then notify the Board; and (2) NYCEDC shall consult with NYSDEC to determine whether any hazardous materials investigation or remediation need be performed in the project area, and if hazardous materials investigation or remediation is required, NYCEDC shall be prohibited from performing any salvage

¹⁵ Although SEA's recommendations would condition not only salvage activities but the abandonment authority itself, given the fact that this is an adverse abandonment, we will apply the condition only to salvage activities.

¹⁶ In its EA, SEA had noted that the New York Historic Preservation Field Services Bureau (Bureau) required additional time to evaluate the historical significance of the tracks and facilities. In comments to the EA, the Bureau stated that the proposed abandonment would have no effect upon cultural resources and that the property is not eligible for inclusion in the National Register of Historic Places. Therefore, SEA determined that no historic preservation condition is required here.

activities until it performs adequate investigation and remediation and shall then notify the Board with written verification.

2. Abandonment of the tracks and facilities will not have a serious, adverse impact on rural and community development.

3. As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The application is granted subject to the conditions specified above.

2. NYCH's motion to reject the notice of intent, adverse abandonment application, and supplement to the application, and reply to the petition for extension is denied.

3. NYCH's motion to strike is granted.

4. This decision is effective on June 11, 2003.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams
Secretary